Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

85-339

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

LYNN JOHNSTON, Petitioner,

v.

JAMES DOWLING, RON EDGERTON, RODNEY L. KATKA, JAMES W. CALDWELL, CHARLES A. PARKS AND AN UNKNOWN NUMBER OF OTHER PERSONS EMPLOYED BY, OR WORKING IN CONCERT WITH THE IRS,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Lynn Johnston
Box 2439
Ann Arbor, Michigan 48106
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QUESTIONS PRESENTED FOR REVIEW

I. Is it a violation of the Federal Rules of Civil Procedure *56(c) to base an order to amend or suffer dismissal of a plaintiff's complaint upon the absence of an opposing affidavit if plaintiff's complaint incorporated a formal notice of verity attested by the sanctity of oath, under notarial seal.

The lower courts, in effect, claim the answer is no.

Petitioner claims the correct answer is yes.

II. Is a pre-trial judicial declaration of qualified immunity for alleged constitutional torts and absolute immunity for common law torts for government employees a violation of the 7th Amendment, the Federal Rules of Civil Procedure *38(a), and 28 USC 2072 paragraph 2?

The lower courts, in effect, say no.

The petitioner claims the correct answer is yes.

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PETITION FOR WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

NOW COMES Lynn Johnston above named Petitioner, to petition this Honorable Court to issue a Writ of Certiorari to review the judgement of the United States Court of Appeals for the 6th Circuit in this case as entered on the 9th of May, 1985.

As grounds Petitioner Johnston respectfully shows the court as follows:

OPINIONS BELOW

The opinion of the Us Court of Appeals for the 6th Circuit and the US District court have not yet been reported; a copy is set forth in the appendix.

JURISDICTION

The Order of the Court of Appeals was entered on the 9th of May, 1985. The jurisdiction of this Court is invoked under (A) 28 USC 1254(1), which confers authority for this Court to review any lower court case upon the petition of any party; and (B) the First Amendment of the US Constitution which acknowledges the right of the people to seek redress of grievances by petition to governmental authorities.

APPLICABLE LAW

Federal Rules of Civil Procedure

Rule 56 Summary Judgment

(c)Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party priors to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositons, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interrlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

Rule 38. Jury Trial of Right

(a) Right Preserved. The right of trial by jury as declared by the Seventh Amendment to the

Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.

The Seventh Amendment

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise be re-examined in any Court of the United States, other than according to the rules of the common law.

28 USC 2072, paragraph 2

Such [Supreme Court] rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution.

STATEMENT OF THE CASE

Petitioner filed a 26 page verrified complaint in federal district court on May 20, 1983 which alleged numerous common law and constitutional

torts occuring between the mid-1970s and May of 1983. The named defendants included current and former employees of the IRS; unnamed defendants were described as being employed by, or working in concert with the IRS.

Prior to plaintiff-petitioner's filing of the complaint she recieved reliable information and evidence to the effect that various incidences and occurrances she suffered (some of a life-threatening, violent nature, others physically non-violent but none-the-less illegal) were inappropriately motivated, carried out, and/or facilitated by cooperating government employees (both IRS and non-IRS) and their private "contractors". One such contractor had been given immunity from future prosecution by the Department of Justice as an inducement or consequence of his involvment in the harassment and attempted silencing of petitioner. Said contractor was a convicted felon of violent temperment. One of the high level government employees who provided such information and evidence warned petitioner that she

was on a "hit list" and would probably be dead within a year and a half. Subsequently petitioner was fired upon three times and survived to make a complaint.

The Department of Justice had declined to authorize a prosecution of petitoner as sought by IRS employee-defendants for years 1975, 1976 and 1977; however, in 1983 immediately before the release of a book petitoner wrote (critical of IRS which included copies of evidence that IRS had attempted to influence federal judges), untimely and illegal demands by defendant IRS employees for money from petitioner commenced for the first time under the guise of a civil tax collection matter for years 1975, 1976 and 1977, despite the hard cold fact that the civil statute of limitations had long since expired and petitoner had no unpaid tax liability.

Upon the recommendation of the legal staff of a federal congressman, petitioner filed her lengthy complaint against respondents for both constitutional and common law torts which additionally sought a district court investigation and order of abatement or injunction with respect to

defendant IRS employees' aforementioned exceedingly untimely attempted "tax collection" activities against petitoner.

The Department of Justice Assistant District Attorney (at his first court appearance in response to peititoners' suit) claimed to represent all of the defendants. In the course of the early pre-trial proceedings, all of the named defendants made "affidavits" (related to the scope of their duties, activities, good-faith intentions, and their innocence) which were successfully used to support a motion for summary judgment.

The district court ordered petitioner to strike each and every allegation or group of allegations from her complaint which defendant-respondents had addressed in their "affidavits", and further the district court judge prohibited petitioner from making any accusations related to the defendant-respondents' bribery of judges, even though their "affidavits did not deny such an activity. Otherwise, the district court declared that defendant-respondents were entitled to immunity.

Petitioner made an appeal for corrective action to the 6th Circuit Court of Appeals on the basis that the district court's order to strike allegations from the verified complaint soley on the basis of defendant-respondents' "affidavits" being superior to her properly attested verified complaint was plain error; and on the basis that immunity endowments in behalf of defendant-respondents was corrupt. The district court's method of squelching petitoner's verified complaint was essentially rubber-stamped by the 6th Circuit panel. The allegations contained in petitoner's verrified complaint remain yet to be evaluated and proven before an impartial jury.

ARGUMENT ONE

Is it a violation of the Federal Rules of Civil Procedure*56(c) to base an order to amend or suffer dismissal of a plaintiff's complaint upon the absence of an opposing affidavit if plaintiff's complaint incorporated a formal notice of verity attested by the sanctity of oath, under notarial seal

The lower courts, in effect, claim the anser is no. Petitioner claims the correct answer is yes.

Rule 56(c), governing summary judgment, says in relevant part that the "judgment sought shall be rendered forthwith if the pleadings...affidavits, if any, show that there is no genuine issue as to any material fact...". A verified complaint should be construed as a pleading under this procedural rule, and valued equally to any other sworn statement (such as an affidavit) on the same subject.

Falsely creating a legal document (either an affidavit or a verified complaint) and then swearing to it, constitutes a criminal act punishable uner 18 USC 1001 by a $10,000 fine and or 5 years in prison. Attesting to the verity of a lengthy complaint is a serious undertaking soberly executed by petitioner.

Petitioner respectfully submits that her verified complaint in this case constitutes a sworn statement that the defendant-respondents committed numerous common law torts and

constitutional torts during a certain time frame; whereas, the defendant-respondents' affidavits, if they may properly be called such* swear that they didn't commit such torts. If one form of sworn legal pleading on the same subject is equal to another, there is no basis for the lower court's summary judgment/dismissal order due to Plaintiff-petitioner's lack of an additional or duplicative sworn statement; and, if one method of attesting statements or allegations is equal to another, the lower court plainly erred in ordering the striking of the allegations (which defendent-respondents swore they were innocent of) in the ordered amended complaint, as plaintiff-petitoner swore they were guilty of those same torts. Clearly, every issue is in dispute if sworn allegations in a complaint are legally equilavent to sworn or opposing affidavits.

One sworn pleading on the same subject being as good as another, the lower courts have plainly erred in their application or interpretation of Rule 56(c).

*Plaintiff-petitioner entered, filed, and argued a "Notice of Objections" for the hearing on this issue which included among other things objections to perjured and bad faith statements in the "affidavits", as well as objection to the lack of a lawful juratication. It would appear that the defendant-respondents' "affidavits" were highly challengable on grounds of both form and content, and that they were NOT closely scrutinized by the courts.

ARGUMENT TWO

Is a pre-trial judicial declaration of qualified immunity for alleged constitutional torts and absolute immunity for common law torts for governmental employees a violation of the 7th Amendment, the Federal Rules of Civil Procedure *38(a) and 28 USC 2072, paragraph 2?

The lower courts, in effect, say no.

The petitoner claims the correct answer is yes.

Petitioner submits that wherein there is a pre-trial condition involving a genuine dispute of material facts, governmental employees accused of common-law or constitutional torts should not be allowed to slide out from litigaton on the merits on the basis of various non-accountability doctrines such as absolute or qualified immunity. If such government employees have extenuating circumstances or a reasonable justification for their common-law or constitutional torts they should present it to an impartial jury or trier of fact, and thereafter argue, that the necessities of their job, and their good faith intentions are sufficently mitigating circumstances that the jury should, in effect, allow them a reasonable measure of immunity or non-accountability in a certain case.

The theory of immunity from accountability for one's tortitous acts or omissions should be raised as a plausible defense theory before the body constitutionally situated to impartially determine the facts and weigh the credibility of witnesses--that is the jury. To deny the plaintiff

(and the public) the right to formally determine the fact and extent of a wrong-doer's acts or omissions as well as an appropriate remedy is an unconstitutional injustice which nullifies the rights of trial by jury in suits at common law.

Petitoner respectfully submits that case precedents relating to the subject of the non-accountability or the immunity argument as a defense theory for tortitous acts or omissions have been prematurely and inappropriately used as a sheild with which to avoid the functions of the triers of fact--and prevent the potential adverse determinations of a jury.

Acts of the various legislatures (if any) creating entitlement to accountability immunity would be an appropriate charge to a jury along with any other jury instructions.

Petitoner submits that it is the function of the jury as finders of fact to determine whether or not the defendant-respondents did in fact act beyond the scope of their official duties, or in bad faith, or with an inappropriate or illegal motive, intent, and/

or purpose. Defendant-respondents' self-serving declarations that they acted within their official scope in good faith should be evaluated by an impartial jury. Evaluation of the fact, circumstances, witnesses and evidence is a determination appropriately made by the jury as the trier of fact. It is they who have the burden of settling in their consciences what is unavoidable, justifiable or excusable-on a defendant by defendant- and tortitous act or omission by tortitous act or omission basis.

What murderous tyrant or abusive little bureaucrat wouldn't fix his own case and declare his own non-accountability if allowed the option to do so? This abusive use of the so-called immunity precedents must end. The present wholesale endowment of immunity for government employees accused of tortitous acts or omsisions, is inappropriate. Unfortunately under present procedures, it doesn't matter what was done to whom or under what circumstances, so long as the government employee is bold enough to claim that he

acted in good faith, within the scope of his official duties and claim entitlement to the benefit of the judicial immunity precedents . Allowance of such a claim prevents any meaningful inquiry and accountability before a jury or plaintiff. The matter ends there with the defendnant-respondents determining and declaring the facts and weighing their own credibility along with the declaration of non-accountability. The procedural problem that has allowed this corrupting practice must end. The 7th Amendment jury holds the cure--on a case by case--allegation by allegation basis, if only this Honorable Court points the direction with a clarifying opinion on the proper and appropriate place to raise what should come to be regarded as "the excusable consequence of official duty tort" or the "immunity theory" of defense.

ARGUMENT CONCLUSION

Petitioner most respectfully submits that the present peitition offers an opportunity not only to remedy the error of the lower courts and injustice

laid upon petitioner, but to eliminate confusion, and straighten-out the issue of tortitous conduct by goverment employees and settle the appropriate time and place to raise the theory of absolute, qualified, or good-faith immunity as a defense theory.

WHEREFORE Petitioner suggests that what has been presented herein is so substantial an example of inappropriate application of procedural rules and immunity opinions as to require this Honorable Court to order briefs and arguments on the merits to give guidance to the courts below on the subject of sworn documents, direct the immunity theory of defense to its proper place, and clarify or re-affirm the substance of the 7th Amendment. May a Writ of Certiorari please issue.

August 6th, 1985 Respectfully Submitted

/s/_____

Petitoner Johnston

AFFIDAVIT

Lynn Johnston after being duly sworn, deposes and says that she served the required number of copies of this Petition for Certiorari upon the following persons by airmail by placing said documents into sealed packages with sufficent 1st class postage afffixed thereon and depositing them into the US mails located in Red Bank, New Jersey on the 6th day of August, 1985; and corrected copies were re-served in the same manner on the 27 day of August, 1985:

The Solicitor General, US Dept. of Justice, Washington, DC 20530; Ross McKenzie, Assistant US Attorney, 231 W. Lafayette, 8th Floor, Detroit, MI 48226; Glenn Archer, Jr., Assistant Att. General, Dept. of Justice, Tax Division, Washington, DC 20530.

/s/_____

Petitioner Lynn Johnston, Box 2439, Ann Arbor, MI

Subscribed and sworn before me a Notary Public:

/s/_____

(SEAL)

APPENDIX

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MICHIGAN

SOUTHERN DIVISION

LYNN JOHNSTON,

Plaintiff,

v. Civil Action

No. 83CV-6192-AA

JAMES DOWLING, RON EDGERTON,
RODNEY L. KATKA, JAMES W. CALDWELL,
CHARLES A. PARKS,

Defendant.

HONORABLE
CHARLES W. JOINER

ORDER

Before the court is defendants' Motion to Dismiss or for Summary Judgment. For the reasons given below, the motion is granted in part.

This is a civil rights action brought against several past and present officials of the Internal Revenue Service. Plaintiff has alleged that defendants have engaged in a long-standing history

of harassment and intimidation against her because she has sought to challenge her liability for federal income taxes.

SOVEREIGN IMMUNITY

Defendants argue that this suit is essentially one against the United States, and is therefore barred by the doctrine of sovereign immunity. The test of whether a suit brought against individual officers of the United States is in fact one against the government itself is whether the "effect of the judgement is to restrain the government form acting, or compelling it to act,"Bramblett v. Descobry, 490 F.2nd 405, 406 (6th Cir. 1974). The defendants argue that plaintiff seeks by this suit to prevent the Internal Revenue Service from collecting taxes from plaintiff.

Plaintiff's prayer for relief requests a combination of equitable and legal relief, including an injunction against further attempts to collect plaintiff's taxes from the years 1975-77, an order that defendants turn over the files that the Internal Revenue Service has maintained on the plaintiff, and

requests for damages, including a request for compensatory damages of $22 million.

Although the equitable relief appears to fall within that category of actions, the effect of which is to restrain the government from acting, plaintiff's prayer for damages against the individual defendants is not directed against the public treasury. The court concludes, therefore, that paragraphs 6.1 to 6.4 of the Complaint, which deal with requested injunctive relief that might impair the enforcement activities of the Internal Revenue Service, should be stricken on the grounds that such relief, if granted, would abrogate the doctrine of sovereign immunity.

Paragraphs 6.5 to 6.8 request the payment of money damages from the individual defendants, and as such, do not violate the prohibition against suits against the sovereign.

ABSOLUTE AND QUALIFIED IMMUNITY

Defendants argue that, as federal officers, they are entitled to absolute immunity under the doctrine enunciated by Butz v. Economou, 438 U.S. 478 (1978). Absent the availability of such absolute immunity,

defendants press for the application of qualified, good-faith immunity, most recently defined by the Supreme Court in Harlow v. Fitzgerald, 457 U.S. 800 (1982).

The Court of appeals for the Sixth Circuit has recently applied the immunity doctrine to a case such as this where a person brought suit against I.R.S. agents for alleged harassment in connection with the performance of an audit of the plaintiff.

In Granger v. Marek, 583 F.2d 781 (6th Cir. 1978) the court interpreted Economou to provide an absolute immunity for I.R.S. agents acting within the scope of their official duties against suits for common-law torts. The court further reasoned that only a qualified, good-faith immunity was available when suit was brought on the grounds that defendants had engaged in so-called "Constitutional torts", which deprived plaintiff of enumerated Constitutional rights, id. at 784. The Granger court concluded that the I.R.S. agents were absolutely immune in that case in which plaintiff alleged that the defendants had engaged in only common-law

torts, such as interference with business relations, and intentional infliction of emotional distres In the instant case, plaintiff has alleged not only a host of common-law torts such as attempted assault and battery and defamation, but also that defendants have interfered with her First Amendment right to petition her government, and her Fourth Amendment right to be free from unreasonable searches and seizures. Thus, with respect to such claimed constitutional violations, defendants are entitled to only a qualified, good-faith immunity. Furthermore, they are entitled to such an immunity only insofar as the actions complained of were undertaken within the scope of their duties as I.R.S. agents, Granger, supra at 785. To the extent that the defendants may have departed from their duties to assess and enforce the tax liability of plaintiff and undertaken harassing tactics against her as a result of their personal animosity towards her, the cloak of official immunity would be unavailable to them, Barr v. Mateo, 360 U.S. 564 (1959).

The question on this motion to dismiss or for

summary judgment then becomes whether or not there remains any genuine question of material fact that defendants engaged in activities for which they were not immunized, and which suffice to support a cause of action for violation of plaintiff's constitutional rights. To resolve this question, we turn to the pleadings, and the affidavits filed by defendants in support of their motion for summary judgment.

Each of the defendants in this case has filed sworn affidavits in conjunction with this motion, in which they state that they did not employ electronic surveillance of plaintiff, nor employ other practices which might have constituted violations of plaintiff's Fourth Amendment rights (e.g. breaking and entering, opening mail). They further disclaim having undertaken any acts of sabotage against plaintiff's automobile, or any acts which might have constituted assaults against plaintiff, either physical or verbal.

Plaintiff does not contest these sworn statements by submitting a competing affidavit. In other words,

she has failed to support the allegations of her complaint against sworn declarations that those allegations are false. A party resisting a motion for summary judgment will not prevail merely by resting on the pleadings in the face of contrary affidavits, but must at the least produce sworn affidavits of her own in order to maintain a live controversy with respect to material questions of fact, Fed.R.Civ.P. 56(e), Granger, supra at 786.

Plaintiff, apparently conceding that she is unable to offer a sworn affidavit in contravention of the defendants affidavits, nonetheless argues that defendants have failed to deny certain allegations in her complaint. In particular, plaintiff cites allegations in paragraphs 3 through 3.10, which include assertions that defendants worked in concert to deny plaintiff her constitutional rights; that they have conducted public scare campaigns; that they have attempted to influence federal judges; that they have maintained a large number of files relating to plaintiff's activities; that they have discussed plaintiff's regligious beliefs, political values, and

personal life with various unnamed persons; that they have informed plaintiff's associates of their disapproval of her tax-resistance activities; that they improperly influenced state and local enforcement officials; and that they have conducted vexatious litigation against plaintiff. The vice with all of these allegations is that they uniformly fail to specify the identity of the persons charged with wrongdoings, the approximate dates of the alleged wrongdoing, and a sufficiently precise description of the wrongful conduct. Although pro se civil rights actions are to be liberally construed by the courts, mere conclusory allegations that unspecified constitutional rights have been infringed with not suffice. Wilkerson v. Mock, 403 F.Supp. 971 (E.D. Pa. 1975).

The allegations that have been expressly denied by the defendants' affidavits can no longer form the basis for liability in this action. Because plaintiff has combined allegations to which there no longer remains a material question of fact with those which are infirm for lack of sufficiently precise

statements of fact into common paragraphs of her complaint, the court is unable to draft an order identifying particular paragraphs that are to be stricken on the grounds of the absence of a material question of fact. Consequently, it is ordered that this complaint will be dismissed in its entirety unless the plaintiff amends the complaint within 30 days of the date of this order. The amended complaint must set forth those allegations which continue to be viable in light of defendants' affidavits, and those allegations must contain the precise information described above; that is, the allegations must identify the persons charged with wrongdoing, the approximate dates of the wrongdoing, and a simple and precise description of the wrongful conduct, in accordance with the pleading rules established by Fed.R.Civ.P. 8(a). However, plaintiff is precluded from alleging again those facts that have been addressed by the affidavits of the defendants. In particular, she shall refrain from alleging the following facts:

(1) that any of the defendants employed electronic surveillance of plaintiff;

(2) that any of the defendants engaged in the bribery of judicial or law-enforcement officials in connection with their investigation of plaintiff's tax liability;

(3) that any of the defendants engaged in breaking and entering into any premises or entered any premises by surreptitious means in connection with their investigation of plaintiff;

(4) that any of the defendants tapped any phones in connection with their investigation;

(5) that any of the defendants attempted to or did in fact sabotage plaintiff's automobile;

(6) that any of the defendants assaulted the plaintiff, either with words or action, or attempted to provoke a violent confrontation with plaintiff, or otherwise attempted to intimidate her by firing guns or running her down with an automobile;

(7) that any of the defendants attempted to intimidate any of plaintiff's associates in connection with their investigation of plaintiff.

Although this Court in no way discourages plaintiff from exercising her First Amendment rights to protest the tax laws of the United States and the action of the agents of the Internal Revenue Service in enforcing those laws, she should be reminded that the filing of civil actions against individual I.R.S. agents without a truthful factual basis for alleging liability is not a permissible manner of voicing her criticism. In the event that plaintiff is able to substantiate her allegations that I.R.S. officials have interfered with her protected right to protest official conduct, a right which lies at the heart of the First Amendment, this Court will not hesitate to fulfill its constitutional duty to assess appropriate sanctions for such interference.

DISMISSAL PURSUANT TO RULE 12(b) (4)

Defendants Edgerton and Caldwell have stated in their affidavits that they have never been served with a copy of the complaint or other process in connection with this action as is required by Fed.R.Civ.P. 4. Further, the Court has no record of return of service with respect to either of these

defendants. As a result, dismissal of this action with respect to these defendants is appropriate under Fed.R.Civ.P. 12(b) (4). Plaintiff is granted leave to file a complaint against these individuals in the event that proper service is obtained upon them.

COSTS AND ATTORNEY'S FEES

Because the Court is not convinced that the plaintiff's allegations are wholly spurious and designed merely to harass defendants in the fulfillment of their official duties, the Court will not decide the question raised by defendant's request for costs and attorney's fees incurred in the defense of this action at this time. Defendants may again move for recovery of these costs at a later point in this action, if the action continues.

SO ORDERED.

/s/ CHARLES W. JOINER
UNITED STATES
DISTRICT JUDGE.

Dated: Nov 30, 1983
Ann Arbor, Michigan

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MICHIGAN

SOUTHERN DIVISION

LYNN JOHNSTON,

Plaintiff,

Civil Action

vs. No. 83CV-6192

JAMES DOWLING, RON EDGERTON,
RODNEY L., KATKA, JAMES W. CALDWELL,
and CHARLES A. PARKS.

Defendants.

HONORABLE
CHARLES W. JOINER

ORDER

Plaintiff in this case has moved for reconsideration of an order that was entered in this case pursuant to a motion for summary judgment that was joined by all defendants. That order, dated December 1,1983, granted partial summary judgment in favor of the defendants, and granted plaintiff 30

days leave in which to amend her complaint to provide more specific allegations of the unconstitutional conduct of defendants upon which this suit was brought. Plaintiff has failed to so amend her complaint, and for that reason, the Court will enter final judgment in favor of all defendants in this case, in accordance with the terms of its December 1st order.

The Court concludes that plaintiff has not satisfied the requirement of Local Rule 17(k), which governs motions for reconsideration, that she demonstrate some "palpable defect by which the Court and the parties have been mislead", so as to justify an alteration of the December 1st order. For that reason, the motion is denied

SO ORDERED.

/s/CHARLES W. JOINER
UNITED STATES
DISTRICT JUDGE

Dated: Jan 23, 1984
Ann Arbor, Michigan

Nos 84-1129 and 83-1392

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the court. This notice is to be prominently displayed if this decision is reproduced.

LYNN JOHNSTON,

Plaintiff-Appellant,

v. **ORDER**

JAMES DOWLING, RON EDGERTON, RODNEY L. KATKA, JAMES W. CALDWELL, AND CHARLES A. PARKS,

Defendants-Appellees.

BEFORE: ENGEL, Circuit Judge; and PHILLIPS and PECK, Senior Circuit Judges

This appeal has been referred to a panel of the Court pursuant to Rule 9(a), Rules of the Sixth Circuit. After examination of the record and the briefs, this panel agrees unanimously that oral argument is not needed. Rule 34(a), Federal Rules of Appellate Procedure.

The appellant is appealing a summary judgment dismissing her civil rights action, case number 84-1129, and she appeals from the denial of her motion for a preliminary injunction, case number 83-1392. The action is based on the appellant's allegations that constitutional deprivations and tortious injuries have been imposed upon her due to a history of harassment and intimidation against her by the appellees. The district court applied the doctrine of absolute immunity concerning common law tort claims, and further found that the appellees' uncontroverted affidavits, establishing qualified immunity as to the constitutional claims, required entry of summary judgment.

The appellant's main claim on appeal is that it was unconstitutional to grant the appellees immunity and

that it was improper to enter summary judgment on her constitutional claims because she had not filed affidavits in opposition to the summary judgment motion. Where the alleged wrongs in an action are based in common law tort, a federal official's discretionary conduct within the scope of his official duties is protected by absolute immunity; where the alleged wrong concerns constitutional deprivations, the official is due qualified good faith immunity. Granger v. Marek, 583 F.2d 781 (6th Cir. 1978); Queen v. Tennessee Valley Authority, 689 F.2d 80 (6th Cir. 1982. The filed affidavits supporting the motion for summary judgment established that the actions against the appellant were performed by the appellees within their official capacity in good faith during civil and criminal investigations. Consequently, the district court did not err in applying the above immunity standards. Furthermore, it is clear that once a party makes a motion for summary judgment, the reponding party can not rest on the allegations in the pleadings but must respond by submitting other evidence or affidavits which

show that there is a genuine issue of fact. Granger v. Marek, supra. The appellant did not submit affidavits or offer other evidence to oppose the summary judgment motion. Consequently, the district court was correct in entering the summary judgment.

The appellant next contends the district judge should have disqualified himself from hearing the case pursuant to 28 U.S.C. S144. The bias or prejudice which will disqualify a judge must be personal bias as distinguished from a judicial one. Oliver v Michigan State Bd. of Ed., 508 F.2d 178 (6th Cir. 1974). An affidavit in support of the motion for disqualification must set forth the facts and reasons supporting the belief that the judge is biased. Davis v. Fendler, 650 F.2d 1154 (9th Cir. 1981). The appellant's contention in this respect is without merit because she is merely challenging the district court's past judicial rulings, and she does not allege facts sufficient to show personal bias.

The appellant's third claim on appeal concerns whether or not the district court abused its discretion in granting the appellees an enlargement

of time to answer the complaint. A motion for extension of time is within the discretion of the district court and is usually viewed liberally so as to work substantial justice. Anderson v. Stanco Sports Library, Inc., 52 F.R.D. 108 (D. S.C. 1971). Given the number of defendants involved, it is reasonable to assume that an extension of time would be needed to allow the appellees time to coordinate an answer in this case. Additionally, the appellant had not shown prejudice caused by the extension of time. Consequently, this allegation of error is without merit.

Finally, the appellant argues that it was improper to dismiss the claim against defendants Edgerton and Caldwell on the basis of insufficient process. Also, she contends it was error to strike valid allegations from her complaint and require her to file an amended complaint. The argument concerning insufficiency of process is irrelevant in light of the appellant's inability to otherwise state a cause of action against any of the defendants. Furthermore, Rule 56(d), Federal Rules of Civil Procedure,

authorizes entry of partial summary judgment and permits the court to direct further proceedings in an action as are just. The district court properly dismissed the appellant's claims because she did not present evidence in opposition to the motion for summary judgment. Granger v. Marek, supra. Permitting amendment of the complaint with respect to the appellant's remaining first amendment claims was permissible under Rule 56(d).

Accordingly, it is ORDERED that the district court, in case no. 84-1129 be affirmed pursuant to Rule 9(d)(3), Rules of the Sixth Circuit. Further, since the appellant's position on appeal is without merit the denial of the preliminary injunction, case no. 83-1392, is affirmed.

ENTERED BY ORDER OF THE COURT

/S/ JOHN P. HEHMAN, Clerk

UNITED STATES DISTRICT COURT

FOR THE S.E. DISTRICT OF MICHIGAN,

ANN ARBOR UNIT

MISS LYNN JOHNSTON
Plaintiff,

Docket Number
83-CV-6192-AA

v.

Charles Joiner
(District Court Judge)

JAMES DOWLING, et al
Defendants

NOTICE OF APPEAL

Notice is hereby given that Plaintiff appeals to the United States Court of Appeals for the Sixth Circuit from the (☑ Judgment (☑ Order ( ) Other (specify) _____ entered in this action on January 23, 1984.

/s/ Lynn Johnston

(Counsel for Appellant)

Address: P.O. Box 2439

Ann Arbor, Mich. 48106

Date: Feb. 7, 1984